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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,

Petitioners,

v.

GEORGE DEUKMEJIAN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Does California's "compulsory union dues" law violate the First and Fourteenth Amendments insofar as it forces contributions from nonmember civil servants' salaries to advance an employee organization's political and ideological activities affecting interests unobtainable in collective bargaining?

Does California's "compulsory union dues" law violate the First and Fourteenth Amendments insofar as it:

(a) delegates to a union an unfettered governmental power to decide the amount and purposes of nonconsensual deductions from nonmember civil servants' salaries; and,

(b) imposes a union-designed and -controlled rebate system as the means of satisfying the nonmembers' right to due process of law?

Do the decisions of this Court in the area of union security require the lower courts to withhold remedies sought under 42 U.S.C. § 1983 until final judgment?

LIST OF PARTIES TO THE PROCEEDING AS REQUIRED BY SUP. CT. R. 21.1(b)

LYDIA B. CHAMPION, PATRICIA J. DUCEY, DOROTHY C. HAYS, ERNIE LAZAR, ROBIN L. MILTON, GEORGE M. PEAIRS, NANCY SOUSA, CERES C. SPILMAN, ANITA TATRO, RITA VALDEZ, ROBIN E. WOOLSEY, CHARLOTTE P. WYLDE, ARTHUR R. ARGLEBEN, VICTORIA BALDWIN, and M. MARK GALLO.

CALIFORNIA STATE EMPLOYEES ASSOCIATION, GEORGE DEUKMEJIAN, EDMUND G. BROWN, JR., DENNIS BATCHELDER, ALAN GOLDSTEIN, KENNETH CORY, LEO MAYER, and CHARLES P. VALDES.

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No. _____

IN THE

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OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,

Petitioners,

v

GEORGE DEUKMEJIAN, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

Lydia B. Champion, *et al.* (plaintiffs and petitioners) pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion and order of the District Court, entered on September 30, 1983, has not been officially reported (2a).[1] The opinion and order of the United States Court of Appeals for the Ninth Circuit entered

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[1] References herein to "a" pages are to pages in the Appendix to this petition.

on July 30, 1984, is reported at 738 F.2d 1082 (27a).

JURISDICTION

On September 26, 1984 the Ninth Circuit denied a timely Petition for Rehearing En Banc (38a). This Petition for Writ of Certiorari was filed within the required 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the U.S. Constitution's First Amendment protections to rights of speech, petition and association and Fourteenth Amendment guarantees of equal protection and due process of the law. It invokes remedies for violation of these rights pursuant to 42 U.S.C. § 1983. It challenges the January 1, 1983 amendment, Government Code §§ 3515.7 and 3515.8 to the California State Employer-Employee Relations Act, Government Code §§ 3512 through 3524. The verbatim text of these constitutional and statutory provisions with the implementing agreement between the governor and employee organization are presented at 42a through 48a.

The pertinent provisions of the 1983 amendment are:

> § 3515.7(b) The state employer shall furnish the recognized employee organization with sufficient

employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee. . . . These fees shall be remitted monthly to the recognized employee organization. . . . The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

§ 3515.8 Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid . . . which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . . The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in . . . conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel . . . return . . . of a fair share fee [portion] which the board may determine to be subject to refund under the provisions of this section. 45a-46a.

STATEMENT OF THE CASE

1. Background Facts

In 1977 the California legislature enacted the State Employer-Employee Relations Act to establish an employee's right to bargain collectively with the state employer. The legislature provided a mechanism for recognizing an employee organization as the exclusive representative of an employee unit. It obligated the state employer and unit representative to meet and confer in a process of negotiation to reach a written agreement on terms and conditions of employment. *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 174, 177-79, 172 Cal. Rptr. 487, 489, 491-92 (1981). Because of the mandate of Article VII of the California Constitution, the legislature limited the "scope of representation" and retained control over many terms and conditions of state employment. The legislature thus excluded such subject matter from the collective bargaining process for determination through the political process. *Pacific Legal*, 29 Cal. 3d at 177-79, 188, 172 Cal. Rptr. at 491-92, 498.[2] All employees had the right to refuse to participate or join in supporting any activity of employee organizations.

In mid-1982 the California State Employees Association (CSEA) submitted, and lobbied effectively for,

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[2] There are many similarities between the instant case and *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984). *Compare Township of West Windsor v. PERC*, 78 N.J. 98, 111-15 (1978) cited in *Robinson v. New Jersey*, Petition for a Writ of Certiorari, No. 84-920 at 5, October Term, 1984.

a bill to "remove the right of an employee to refuse to participate in the activities of employee organizations."[3] Senate Bill 1419, Legislative Counsel's Digest. Enacted January 1, 1983, the statute requires the state to "deduct the amount specified by the recognized employee organization from the salary" of nonmembers and to remit it to the organization. 45a, § 3515.7(b). The statute sets deductions from nonmembers' salaries at a limit of the organization's membership dues and general assessments. 43a, § 3513(j). The law permits the nonmember to demand a return of his share of deductions that the organization expended "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment.'[4] The statute specifically excludes from refund such share of monies the organization expended for lobbying activities designed either to foster its policy goals in collective negotiation or to secure advantages in conditions of

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[3] During 1982 CSEA also opposed or introduced 48 other pieces of legislation covering such subject matter as: civil service reform, taxation on health care service plans, managerial benefits, housing mortgages, prisoners' work, realty investment, changes to the bargaining process, bank and corporate tax, and personal service contracting. It contributed 553,308 dollars to political action committees (PACs) mostly of legislators who advanced CSEA's state legislative positions. Between January and March 1983 CSEA introduced 28 pieces of legislation, expended 68,653 dollars in costs and 123,519 dollars in contributions over 2,500 dollars to influence the passage or defeat of legislation, and gave 140,909 dollars to various PACs. Appellant's Excerpts of Record at 315-71.

[4] CSEA's directors set the amount of dues and fee deductions to fund partisan political causes (PACs) but provide the nonmember a refund at the end of the year when rebates are calculated. CSEA Gress Affidavit at 18, ¶ 15. The statute also requires that the rebate include amounts expended for members' only benefits. Rather than rebate such amounts covering members' life insurance policies and scholarship funds, CSEA claims that it reduces the amount taken from nonmembers' salaries by one dollar per month.

employment outside the collective bargaining process. 46a, § 3515.8.

Petitioners are fifteen civil servants in bargaining units represented by CSEA. At the start of the nonconsensual deductions from their salaries, Petitioners notified the state and CSEA that they opposed deductions for purposes other than reimbursing CSEA's required contract work and demanded proof that collections were to satisfy only those purposes. The state responded that California law authorized deductions in such amounts as were "set by the union" and that the entire matter was between CSEA and the individual employee.[5] Three months later CSEA responded that under Code § 3515.8 it must rebate only amounts taken for its PACs and would do so following the December 31 close of the fiscal year. Petitioners then filed this civil rights action and moved simultaneously for class certification and preliminary relief. Deductions continue.

2. Proceedings Below

Petitioners' motion for preliminary relief claimed that the statute mandated systematic, nonconsensual deductions from nonmembers' salaries to advance a union's political and ideological positions, including legislative ones. Petitioners charged that, while operating under the guise of "fair share" fee regulation, the statute deprived

[5] The statute declares the "state employer shall not be liable in any action . . . for improper use or calculation of fair share fees." § 3515.8. However, in its response the state referenced the Memorandum of Understanding (MOU) which provides "conflicts between the union and employee relative to deduction of agency fee shall not be subject to grievance and arbitration." MOU ¶ 10m.

them of property, associational and due process rights based on their "nonmember" status and on a legislative preference for the subject matter of a union's expressive activities. Petitioners asserted that the state abdicated its constitutional duty to afford procedures adequate to protect the individual citizen's and public's interests at risk in the statutory scheme. Petitioners claimed that the nonmembers' rights to advocate chosen ideas and to due process of law, and the public's interest in democratic political processes, were irreparably injured by continual deductions to finance union political and ideological causes.

The District Court denied preliminary relief. Although it found that the statute clearly and facially infringed First Amendment rights, 8a-13a, and caused irreparable injury, 19a, the District Court held that the union's rebate was the prescribed and acceptable remedy, 14a-15a, 19a-20a. Because the rebate was the process of law to which Petitioners are entitled, 19a, the District Court reasoned that no rights were unconstitutionally lost in the forced subsidy of political causes, and that the temporary loss of mere income would not justify injunctive relief.

The Court of Appeals reviewed the District Court's action under the standard whether "the court misapprehends the law with respect to the underlying issues in litigation," *Sports Form v. U.P.I.*, 686 F.2d 750, 752 (9th Cir. 1982). 30a. It then decided that under this Court's opinions Petitioners were "entitled to no relief until final judgment in their favor is entered." 32a.[6] The Court of

[6] The Court of Appeals relied upon precedents which had rejected "as applied"

Appeals rationalized the compulsory support objective of section 3515.8 for union ideological and political activity on the grounds that a great variety of laws affect public employment and that, therefore, unions must have "broad authority to protect their members' interests before the legislature." The Court of Appeals found that the legislature had implicitly extended the concept of collective bargaining to embrace such union activity of a political or ideological nature relevant to subject matters of member interest. 35a-36a. Relying upon this Court's approval of the "bare authorization" of compulsory fee agreements in the public sector, the Court of Appeals held the instant statute does not abridge employees' First Amendment or due process rights. 33a.[7] It did not address the equal protection issue.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's purpose to preserve inviolate our democratic system of

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constitutional challenges to agency shop agreements authorized by valid statutes facially neutral, or silent, as to restrictions on First Amendment freedoms. In such challenges this Court typically limits its analysis "to the concrete case before" it. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2127-28 (1984). In private sector agency fee cases this Court denied the power which unions claimed under the authorizing statute and found the complainant's injury caused by private abuse. Consequently, this Court vacated broad injunctions which lower courts issued against operation of agreements following the law. No previous agency fee case in this Court involved a facial challenge, due process or equal protection issues, nonconsensual deductions, or 42 U.S.C. § 1983 remedies.

[7] In its treatment of challenges to a similar statutory scheme the Court of Appeals for the Third Circuit concluded that the public employees were also not entitled to injunctive relief. *See Robinson*, 741 F.2d at 608-15. The Seventh Circuit decided differently in *Hudson, infra.*

government "whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political [and ideological] concern." *Abood v. Detroit Board of Education*, 431 U.S. 209, 243 (1977) (Rehnquist, J., concurring). In numerous decisions this Court has struck down attempts to restrict or shift, substantively or procedurally, the individual's power to advocate, oppose, or refrain, from the advancement of issues in the arenas of public debate. The Court has emphasized repeatedly that full First Amendment protections do not depend on the subject matter of speech or the status of the speaker. The Court has never permitted government to restrict the fundamental rights of one group of citizens in order to advance the interests of another.

In *Abood* and *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) the Court manifestly rejected the notion that the application of these principles might yield to government's interest to regulate the statutory right of employees to bargain collectively with a government employer. If these constitutional guarantees mean anything, it can hardly be doubted that they have their fullest and most urgent application precisely to the conduct of this case. The freedoms of petition and association would prove empty guarantees if, as the Court of Appeals would have it, a citizen's control over the decision to engage in political, lobbying and ideological activities could be delegated to another, or bargained away.

In the present case the Court of Appeals reviewed a

request to secure fundamental rights from irrevocable loss. It reviewed an operating statute that requires a government employer regularly to deduct involuntary support from employees' salaries in amounts decided solely by the union to fund its political causes "only incidentally related" to employment. This system leaves the individual with the diminished capacity to pursue an annual rebate through a statutorily imposed process designed and dominated by a self-interested union. The scheme thus mandates unbridled discretion in a private person to determine the fundamental interests of another. The Court of Appeals decided that Petitioners were entitled to no relief until final judgment. It reached this conclusion without independent review of the record facts or scrutiny of the regulation. It found its action compelled by this Court's decisions in various "as applied" challenges to agency-shop *agreements*.

It is inconceivable that, in *Abood* or other agency-shop cases, this Court envisioned either the result or treatment of this case. In shaping protections of fundamental rights this Court has repeatedly directed appellate courts independently to determine the facts and to scrutinize the regulation to insure that its legitimate thrust impacts in the least restrictive manner upon fundamental rights. The Court has also prescribed an analytical model for due process claims which the Court of Appeals apparently rejected in favor of a conclusive presumption that the decision in *Abood* sanctioned this legislature's conduct. If the federal statutory and common law rules of procedure, and the congressional authorization in

42 U.S.C. § 1983 have any salutary purpose, it is, undoubtedly, to prevent the arbitrary and irreparable loss of Fourteenth Amendment rights and consequential harm to the public interests which they safeguard. The conclusion of the Court of Appeals cannot stand as law.

If a state could shield its legislation affecting fundamental interests from meaningful judicial scrutiny and response by delegating its authority to private persons or affixing presumptively safe labels to its statutes, the Fourteenth Amendment would be rendered meaningless. The Court of Appeals refused to vindicate society's interest in these guarantees or to protect petitioners from inevitable and irreparable loss. Because the Court of Appeals found its action fully justified by this Court's decisions, this Court should exercise its supervisory jurisdiction to resolve the important questions of constitutional remedies raised in the disparity between the salutary purpose of section 1983 and its misapplication here.

The decision below cannot be squared with the text of the Constitution, the decisions of this Court, or with common sense. The First Amendment, and the Equal Protection and Due Process Clauses of the Constitution place "[o]ne's right to free speech," petition and association beyond the reach of majorities and legislatures. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). These fundamental laws are of general application[8]

[8] The First and Fourteenth Amendments' provisions often serve to protect significant societal interests broader than those of the parties seeking their vindication. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984).

and their text requires the Court of Appeals to discharge its special obligation to protect those rights from sacrifice to political expediency. *Monroe v. Pape*, 365 U.S. 167, 182-84 (1961). The Court of Appeals' decision and treatment of this case thus endangers the very principles of political and ideological liberty this Court sought to preserve in *Abood*.

1. The Court of Appeals misunderstood this Court's decision in *Abood* and misapplied it to produce a result completely at odds with the principles of that and other pertinent cases. This Court faced two claims in *Abood*. The first claim challenged the bare power of a legislature to require public employees to contribute to a union that bargained with a government employer. *Id.* at 211, 213. The Court approved a requirement to support a union in its capacity as an exclusive representative and for the "commercial purposes of engaging in collective bargaining" with the employer. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3260 (1984) (O'Connor, J., concurring). It held that a legislature may authorize an agency fee agreement insofar as it "required every employee in the unit to pay a service fee to defray the costs of [carrying out the statutory duties of] collective bargaining, contract administration and grievance adjustment." *Ellis v. BRAC*, 104 S. Ct. 1883, 1892, 1896 (1984).

The second claim sought injunctive relief specifically against "the Union's *spending* a part of [the] required service fees" for activities and programs that were political or ideological in nature. *Abood*, 431 U.S. at 211, 213, 234.[9] Respecting such uses for purposes outside the context

[9] The Court of Appeals cites to *Abood*, 232, for the holding "that union

of contract negotiations with the employer, this Court found the employees' rights entitled to the full constitutional protections afforded expressive activity.[10] *Id.* at 235-36. *See also, e.g., Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2880-81 (1983). A unanimous Court thus recognized that the state's interest in regulation of the employees' statutory right to bargain with their employer did not justify regulation of other rights or means of communication. The Court held that government could not, consistently with the Constitution, require one to advance a union's political views or its ideological causes. *Abood* at 235-36.

Examining problems in *Abood* similar to those present-

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security arrangements in public employment do not abridge employee First Amendment or Due Process rights." There is no support for that proposition at 232 or elsewhere. The concrete case put no "Due Process" claim into controversy. Inferentially the Court's note at 227 n.23 may concern the duty of government under the due process clause but this idea hardly supports the Court of Appeals' action or reasoning. In *Abood*'s remedial context the Court did express significant concern for protection of the employee's right to withhold support. *Id* at 241-64.

[10] The constitutional issue arose from a separate statutory authorization permitting unions to engage in lobbying activities. But the agency fee agreement and Michigan statute, *Abood* at 212, 214 n.7, were facially neutral: did not aim at political or ideological activity, nor compel support on the basis of union memberships' viewpoints, nor license the Public Employment Relations Board to administer the law on the basis of such constitutionally impermissible criteria. Compare Cal. Code § 3515.8. However, the Michigan statute did not limit the nonmembers' contribution to a proportionate share of collective bargaining costs. The state court acknowledged the well-recognized political activities of unions and the fact "that Michigan law also permits union expenditures for legislative lobbying." *Abood* at 215. It concluded, therefore, that the legislature sanctioned the use of compulsory fees for purposes other than collective bargaining. *Id.* at 215, 232. Consequently, this Court had to face the "as applied" claims it had been able to avoid in *IAM v. Street*, 367 U.S. 740, 744 n.2, 768-71.

ed here, this Court targeted a remedial objective "to devise a way of preventing compulsory subsidization of ideological activity," in order to avoid the dubious choice to relinquish either one's "right to withhold" support or "freedom to maintain [one's] own beliefs." 431 U.S. at 241; *id.*, 244 (Stevens, J., concurring).[11] Its intent was "to protect a democratic system whose proper functioning is indispensably dependent on the *unfettered* judgment of each citizen on matters of political [and ideological] concern." *Id.* at 243 (Rehnquist, J., concurring). Accordingly, this case presents a substantial question as to the constitutionality of a statute which features incarnate the evils denounced by this Court in *Abood.*

The Court of Appeals interpreted the decision in *Abood* to mean that a federal court is precluded from deciding that any "agency fee" legislation violates the First and Fourteenth Amendments. No judge below understood that the approval of service fees in *Abood* was a general one and was not meant as approval for any particular substantive restriction. Indeed, in that very case a unanimous Court held that the state action in application of an agreement violated the plaintiffs' rights.

The Court of Appeals also erroneously held that the exercise of its duty under 42 U.S.C. § 1983 must await final judgment. 32a-33a. That decision cannot be reconciled with the purpose of the Civil Rights Act or equitable principles. *See, e.g., Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969). The Court

[11] *Abood* came to the Court on appeal of an order dismissing the complaint for failure to state a claim upon which relief can be granted. *Id.*, 213 n.4, 236-37.

of Appeals has, in fact, sanctioned a scheme that in purpose and necessary effect violates that constitutional "preserve where the views of the individual are made inviolate"[12] and where the legislature must take steps to assure "respect for constitutional liberties."[13] The Court of Appeals' action is clearly error of federal constitutional magnitude.

2. The due process questions presented by this petition are substantial and warrant the attention of this Court. The decision below authorizes a legislature to impose a union-controlled rebate upon the property and liberty interests of employees who choose not to asso-

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[12] *Schneider v. Smith*, 390 U.S. 17, 25-26 (1968) (the Bill of Rights preserves the dignity of the individual to order his own political will). This Court has repeatedly rejected as too facile an approach that looks no further than the general power of government. *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939) ("mere legislative preferences . . . are insufficient to justify such [regulation] as diminishes the exercise of rights so vital to the maintenance of democratic institutions.") It required "[e]ach regulation . . . be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity of the means adopted." *United States v. Robel*, 389 U.S. 258, 270-71 (1967) (Brennan, J., concurring). Subsequently, the Court voided government attempts to disable freedom of choice either by "prohibition" or "inhibition." *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). The Court struck down attempts to restrict people's will to expend monies to advance public policies, ideas, or legislation. *Buckley v. Valeo*, 424 U.S. 1, 48-51 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Brown v. Hartlage*, 456 U.S. 45, 58-60 (1982).

[13] *Watkins v. United States*, 354 U.S. 178, 205 (1957) (the duty is to prevent the existence of a "wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.") When fundamental interests are at stake this Court held procedural protections essential to avoid that gulf. *Speiser v. Randal*, 357 U.S. 513 (1958). The legislature's responsibility is especially acute in the area where the lines are finely drawn between speech unconditionally guaranteed and speech

ciate with the union. That decision directly conflicts with decisions of the Seventh Circuit and Supreme Judicial Court of Massachusetts. It also conflicts with this Court's decision in *Ellis* rejecting "rebate" even as a remedy for a statutory violation. The Court of Appeals' analysis and application of the controlling constitutional principles are at odds with decisions of this Court.

Shortly after the decision below, the Court of Appeals for the Third Circuit similarly reached its conclusion in *Robinson*. An awareness of prevailing First Amendment principles, however, led the Seventh Circuit to a contrary conclusion in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1194 (1984). In that appeal from denial of injunctive relief sought under section 1983, Judge Posner found this Court's decisions required government-controlled procedures to "make reasonably sure" that employees' wages are not taken involuntarily "to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." *Id.* He also held that a union rebate does not satisfy government's duty under the Fourteenth Amendment. Contrary to the Ninth and Third Circuits, the Seventh Circuit held that a union's unilateral decision to escrow involuntary collections does not moot the question of injunctive relief. *Id.* at

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legitimately regulated. *Blount v. Rizzi*, 400 U.S. 410, 417 (1971). Because procedure "marks much of the difference between rule of law and rule by fiat," *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), the legislature is not "free to make any process 'due process of law.'" *Den v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). It is not just the individual, but organized society as a whole, that is wronged by failure to afford the right to due process. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 44 (1980).

1196-97.[14]

In agreement with the Seventh Circuit the Supreme Judicial Court of Massachusetts followed this Court's decisions to conclude that any presumption of validity of a fee runs "afoul of the constitutional requirement that the organization bear the burden of proving the assessed fee legitimate." *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 76-82 (1982). It concluded that this burden of proof is only meaningful if the organization is required to prove the assessment's validity before a neutral, government tribunal subject to judicial review. *Id.* at 82. It reasoned that a statutory requirement to use an internal union procedure would render that statute suspect on First Amendment grounds "without adequately countervailing legislative justification." *Id.* at 79. As did the Seventh Circuit, this well-regarded state court found government's interest was to facilitate payment of a "permissible fee" with appropriate regard for the employees' right to engage in their own activities. *Id.* at 83-84. *Hudson*, 743 F.2d at 1192. These issues will surely arise elsewhere. This petition should be granted to resolve the conflicting application of principles with profound effects upon public employees' rights.

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[14] A union's "voluntary" decision at the onset of, or during litigation, to provide a precollection reduction under its own idea of the legal purpose and amounts of such fees does not cure a statute which, like section 3515.8 here, or NJSA 34:13A-5.5(c) in *Robinson*, *supra*, stands as express authority for providing only postcollection "refunds" under a doubtful standard. To the extent it provides that authority it must be held unconstitutional and its operation enjoined. CSEA's newly "evolving" remedy of today, 36a, may tomorrow become nothing more than history. *See Allee v. Medrano*, 416 U.S. 802, 810-11 (1974). Constitutional rights are not compensable by money nor is the public interest in

3. In *Ellis* this Court reversed the Ninth Circuit's faulty ruling that a union's rebate system might satisfy either constitutional or statutory concerns. 104 S. Ct. at 1889-90. Although that decision came in the context of a remedy for statutory violations, it is apparent that no member of this Court would impose union policies as constituting due process of law. Union officers are not answerable or responsive to the people but rather to their own membership. Under our system of government these bodies are not endowed with authority to decide whether property or liberty interests will be deprived. Because the objective of due process is to adequately inform the decisions of government, it is inconceivable how a union refund procedure might satisfy that objective.

Indeed, the focus here is the state's conduct, whether action or inaction, that gives rise to the constitutional attack. That conduct takes the concrete form of a statutory enactment and government operations which Petitioners stressed "abdicate[d] effective state control over state power." *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). And, this conduct goes further than the statutes scrutinized and held invalid in the *Fuentes* line of cases. Not only has the California legislature removed even nominal supervision, it has also authorized a private party to exercise a governmental power with far more significance than the power exercised in those cases involving commercial disputes. Thus, the concern here must be with the very function of government implicated by delegation of power to a private group where serious potential for self-serving action is created. *See, e.g., Washington ex*

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their scrupulous observance rebatable.

rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-22 (1928). Such power to restrict, or indeed to bar competition in a field of ideas so vitally connected with the public welfare may not constitutionally be placed in the hands of a private organization which acts to promote its own special interests. It is to official bodies that society looks to implement the central concept of due process. In this instance since the state is in a position to provide predeprivation process, the Constitution and decisions of this Court require it do so. *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984).

A. The Court of Appeals failed to follow the analytical framework this Court prescribed for determining the "specific dictates of due process." *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Had it not, it would have found Petitioners' interest in procedures self-evident. Their interests in property and in statutory and fundamental liberty may be lost irrevocably. An improper deduction "works a uniquely final deprivation." And, under a system controlled by the union and a broad standard, the risk of an erroneous deprivation is substantial.[15] Most importantly the loss of the opportunity for an effective hearing is unrecoverable. The deprivation of due process is, therefore, irreparable. *Fuentes*, 407 U.S. at 82. To defer relief until final judgment permits an action affecting fundamental interests to escape due process guarantees. The decisions of this Court should not be read to dignify that result.

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[15] CSEA admits it does not know, and declares that it would be an "extremely time-consuming and difficult," and "unwarranted" task to ascertain the amounts spent in collective bargaining activities with the state. CSEA Response to Interrogatories Nos. 12, 13 & 14.

B. The Court of Appeals assumed a broad justification for the statute. It never addressed the values of the rights impacted or nature of the restrictions imposed by the statutory scheme. With deeply troubling parallels to the Third Circuit's treatment of the *Robinson* case, it applied *Abood* to foreclose investigation. As previously noted, such treatment raises significant constitutional questions for it allows a legislature, by statutory labels, to shield its conduct from review.

In cases raising First Amendment issues, an appellate court has an obligation to independently examine the record in order to make sure that the judgment does not support a forbidden intrusion on the field of free expression. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1982). The analytical framework for that examination is well known. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (regulation of First Amendment rights is always subject to exacting review). "The constitutional inquiry is not qualified by any analysis of governmental interests." *Roberts*, 104 S. Ct. at 3260. In every aspect of its charge the Court of Appeals disregarded this Court's clear rules. Significantly, it avoids the necessary inquiry through its "understanding that collective bargaining in the public sector requires resort to the legislature on various employment related questions." 35a.[16] That purpose,

[16] As footnote 3 might indicate, CSEA provided an organized pressure group to present grievances in public forums long before the instant statute. As citizens, its members did and continue to advance their interests in the area of public employment. But law, not contract, emerges from this process. It is not a "good faith" negotiation between parties. The legislature's accountability and duty is to all citizens under the Constitution. It must act unilaterally to discharge that duty. The people's rela-

however, hardly justifies transfer of the individual's will to the policymaking power of a private group.

This Court has squarely rejected just such effort to distort the focus of collective bargaining in order to restrict core First Amendment freedoms. *Madison Joint School District*, 429 U.S. at 174-76 & n.10; *see also, Bellotti*, 435 U.S. at 777 nn.11-13, 785. The "criterion" for the Court's distinctions is "not the *terminology* used by the legislature or the courts but the *process* used by the parties." C. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974) (emphasis added). It would be a mournful day for democracy were the state able to bargain away the citizen's rights or its duties under the Constitution. Nor may "the exacting scrutiny required by the First Amendment" be reduced by the state's focus on money. *Bellotti*, 786 n.23. To the contrary, "constitutional concerns" are at their greatest here for this case involves the state's attempt to impose its will by force of law." *Maher v. Roe*, 432 U.S. 464, 476 (1977).

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tionship to it is not through negotiation. This process is not collective bargaining and the Ninth Circuit, or Third Circuit, cannot make it so. It is no different in the private sector, *Abood*, 431 U.S. at 232, although the decision in *Robinson*, 741 F.2d at 607, 609, holds differently. As with any other person, union memberships are bound by law and may influence government through the political process to change it. Historically, pertinent state and federal laws, including any statutory restrictions on the scope of negotiable matters, enter into and form part of the contract process and terms. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977). Private sector unions are no less constrained by these laws than others. *See NLRB v. Magnavox Co.*, 415 U.S. 322 (1974); *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

CONCLUSION

For the above stated reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A-1

Memorandum of Decision and Order of the United States District Court, Central District of California, September 30, 1983.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LYDIA B. CHAMPION, *et al.*, *Plaintiffs,*	)	NO. CV 83-2598-LTL (Gx)
vs.	)	**MEMORANDUM OF DECISION AND ORDER**
STATE OF CALIFORNIA, *et al.*, *Defendants.*	)	September 30, 1984

This matter is here on plaintiffs' motions for a preliminary injunction and for certification of classes, and on certain defendants' motion for abstention. For the reasons stated below, all three motions are denied.

The civil rights action challenging the constitutionality of the January 1, 1983 amendments to the California State Employer-Employee Relations Act ("SEERA") was filed on April 26, 1983. The amendments allow the state and unions representing state employees to enter into bargaining agreements which include provisions requiring that non-union employees in the bargaining unit pay "fair share fees" to the unions through involuntary, automatic payroll deductions. Objecting non-union employees can obtain a refund of their pro rata share of union expenditures for political activities. The refund, however, does not include the pro rata share of "costs of support

of lobbying activities designed to foster policy goals and [sic] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through meeting and conferring with the state employer." Cal. Govt. Code § 3515.8. Refunds can be obtained "under procedures established by the recognized employee organization." *Id.*

Plaintiffs are fifteen members of bargaining units represented by defendant California State Employees Association ("CSEA") who are subject to automatic deductions of their fair share fees pursuant to a bargaining agreement entered into between CSEA and the State of California. Defendants are Governor Deukmejian and Michael Frost (Frost, Director of the Department of Personnel Administration, was substituted as a party in place of original defendant Dennis Batchelder), Jerry Brown and Alan Goldstein (predecessors of Deukmejian and Frost), Controller Kenneth Cory, and CSEA and its past and current presidents (Leo Mayer and Charles Valdes). Defendant State of California has been dismissed from the action with prejudice.

The first cause of action, pursuant to 42 U.S.C. § 1983, alleges that plaintiffs have been deprived of their constitutional rights in five respects:

(1) Plaintiffs are compelled to finance expenditures not directly related to collective bargaining, contract administration and grievance adjustment, in violation of their First Amendment speech and associational rights;

(2) Plaintiffs are forced to wait up to one year and

more before receiving their refunds for political expenditures, again in violation of their First Amendment rights;

(3) Plaintiffs are deprived of due process of law because they have no right to any hearing prior to taking of their property via the automatic payroll deductions;

(4) Plaintiffs are denied equal protection of the laws since they are subjected to automatic payroll deductions, whereas CSEA members are subjected to payroll deductions only if they authorize such deductions in writing; and

(5) All other unions which entered into fair share fee agreements with the state were not entitled to automatic payroll deductions until they certified either (1) that 50% of the bargaining unit employees were union members, or (2) that a majority of the bargaining unit employees had voted for automatic deductions. In violation of plaintiffs' equal protection rights CSEA was not subjected to this requirement, even though only 47% of the bargaining unit employees represented by CSEA were CSEA members at the time the agreement went into effect.

The second cause of action alleges that SEERA is unconstitutional on its face and as applied under the First and Fourteenth Amendments and under Article I, Sections 2 and 7 of the California Constitution, for the reasons listed above. The third cause of action alleges that the state and CSEA failed to comply with the notice and public hearing requirements of SEERA prior to entering into the fair share fee agreement.

Jurisdiction over the first and second causes of action is proper under 28 U.S.C. §§ 1343 and 1331. Jurisdiction

over the third cause of action is pendent.

Plaintiffs seek to represent two classes. With respect to the First Amendment claims plaintiffs seek to represent bargaining unit employees who have not joined CSEA and who object to use of their fair share fees even temporarily for purposes or activities other than collective bargaining, contract administration and grievance adjustment. With respect to the equal protection and due process claims plaintiffs seek to represent all employees in CSEA-represented bargaining units subject to the fair share fee agreement.

Plaintiffs seek a declaratory judgment that SEERA is null and void on its face and/or as applied under the United States and California Constitutions. A similar declaration is sought as to the state-CSEA fair share agreement. A declaration that the agreement is null and void is also sought on grounds that it was entered into before compliance with the notice and public hearing requirements of SEERA. A preliminary injunction is sought enjoining the public defendants from deducting fair share fees and enjoining the private defendants from receiving or retaining fair share fees. A permanent injunction is sought enjoining violations of plaintiffs' constitutional rights and compelling the return of unlawful deductions for fair share fees. Finally, plaintiffs seek attorney's fees and damages including exemplary damages.

I. DEFENDANTS' MOTION FOR ABSTENTION

As stated earlier, Cal. Govt. Code § 3515.8 entitles state employees who pay a fair share fee to demand a

return of that portion of their fee used to finance expenditures "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." The refund, however, is not to include the employee's share of expenditures for certain generally-described lobbying activities.

Plaintiffs contend that the decision in *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), limits the use of fair share fees collected from objecting employees to expenditures "for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225-26. Thus, according to plaintiffs, to the extent that Cal. Govt. Code § 3515.8 provides that plaintiffs cannot obtain a refund covering their pro rata share of expenditures for lobbying activities, that section is unconstitutional on its face. Plaintiffs also seek to mount an "as applied" attack on the statute. Defendants contest this position, and argue on this motion that because of ambiguity in the language of § 3515.8 state court construction of the statute could eliminate the need to address plaintiffs' constitutional challenges. Defendants thus contend that this case is appropriate for "Pullman abstention."

To determine the appropriateness of abstention under *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), the Ninth Circuit has set forth criteria which must be met before abstention is proper:

> (1) the complaint must touch a sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudica-

> ication; (2) a definitive ruling on the state issue by a state court could obviate the need for constitutional adjudication by the federal court; and (3) the proper resolution of the possibly determinative state law issue is uncertain.

Richardson v. *Koshiba,* 693 F.2d 911, 915 (9th Cir. 1982) See also *Manney* v. *Cabell,* 654 F.2d 1280, 1283 (9th Cir. 1980), *cert. denied,* 455 U.S. 1000 (1982); *Canton* v. *Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). The second prong of the above test, however, would appear to be an incomplete statement of the law. Abstention is proper not only where a ruling on the state issue obviates the need for constitutional adjudication, but also where the constitutional issue might be presented "in a different posture" by a state court determination. *County of Alleghany* v. *Frank Mashuda Co.,* 360 U.S. 185, 189 (1959); *Babbitt* v. *Farm Workers,* 442 U.S. 289, 306 (1979).

Where the three above criteria are met, abstention is appropriate "in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harmon* v. *Forssenius,* 380 U.S. 528, 534 (1965). In *Pullman* itself the Court spoke of exercising "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman, supra,* at 501. The Ninth Circuit cautions, however, that abstention is only reluctantly applied in civil rights cases alleging constitutional violations. *Richardson supra,* at

917, n.17; *Manney, supra,* at 1284; *Stephens* v. *Tielsch,* 502 F.2d 1360, 1362 (9th Cir. 1974).

While we conclude that the first criteria for *Pullman* abstention has been met here, we find that defendants have failed to satisfy the second and the third criteria. As plaintiffs note, their constitutional argument is that *no* lobbying activities may be financed by the collection of fair share fees from objecting non-union employees. Since *some* lobbying activities must be found by state courts to be permissibly financed through the compelled collection of fair share fees, no matter how narrowly § 3515.8 is construed, no definitive state court ruling could obviate the need for constitutional adjudication. Of course, state courts theoretically could find that all of CSEA's lobbying activities do not fall within the "lobbying activities proviso," a finding which would eliminate the need to decide the constitutional issues. As will be discussed below, however, this is not a realistic possibility.

The *Affidavit of Kenneth C. Murch*, Operations Division Administrator for CSEA, discusses many of the lobbying activities which CSEA engages in:

> During the January to July period the CSEA legislative staff is working with the Assembly and Senate Fiscal Committees to ensure that funds are available for state employee salaries and benefits . . . The legislative staff is also busy fighting off the constant flow of new bills that would take away existing rights or benefits the state employees enjoy.

> Some samples of such bills that CSEA successfully opposed are those that would provide lower retirement benefits for future employees and allow for expanded contracting-out of government work to the private sector, thus threatening state employee jobs.

Murch Affidavit, ¶ 9, p. 7-8.

In order for *Pullman* abstention to be proper, application of SEERA to expenditures for such lobbying activities must be doubtful and uncertain. Although it is true that no California court has yet construed § 3515.8, this court would be creating a dispute where none legitimately exists if it found that the permissibility of these expenditures was doubtful. Lobbying for funds in the state budget to pay employee salaries could not be found to be impermissible under the statute without severely straining the language of the statute allowing expenditures for "lobbying activities designed to foster policy goals and [sic] collective negotiations." Similarly, lobbying for legislation directly geared to providing benefits for state employees or all employees would seem to squarely fall within the broad protection of lobbying expenditures "to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

Accordingly, defendants have failed to satisfy either the second or the third prong of the *Pullman* test. While the language of the statute is far from unambiguous, no reasonable resolution of the ambiguities could eliminate the constitutional questions here presented. Nor have

defendants shown that application of the lobbying activities proviso to defendants' lobbying activities is uncertain. Even assuming that some such activities would be found to be impermissible, since it is clear that many others are permissible abstention is improper. Cf. *Canton* v. *Spokane School District #81,* 498 F.2d 840, 846 (9th Cir. 1974).

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1. *Standards on preliminary injunction motions*

It is well established in the Ninth Circuit that "[a] preliminary injunction should be granted only if the movant can show either: (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the movant's favor." *Glacier Park Foundation* v. *Watt,* 663 F.2d 882, 884 (9th Cir. 1981); see also *Miss Universe* v. *Flesher,* 605 F.2d 1130, 1134 (9th Cir. 1979); *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975). Recent cases have made it clear, however, that these are not really two entirely separate tests, but that they are merely extremes of a single continuum. *Benda* v. *Grand Lodge of International Association of Machinists,* 584 F.2d 308, 314-15 (9th Cir. 1978).

2. *The merits*

a. Use of fair share fees to finance lobbying activities

Citing language in *Abood, supra,* plaintiffs contend that fair share fees may only be expended "for the pur-

poses of collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225-26. The Ninth Circuit, which this court is bound to follow, has explicitly rejected this position. *Ellis* v. *Broth. of Ry., Airline & S.S. Clerks,* 685 F.2d 1065, 1072 (9th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3746 (April 19, 1983). The standard which this court must apply is "whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Id.* The *Ellis* standard has subsequently been applied by another Ninth Circuit panel. *Assoc. Bldrs. & Contractors* v. *Carpenters Vac., Etc.,* 700 F.2d 1269, 1275 (9th Cir. 1983). The question presented, then, is whether lobbying activities are "germane to the union's work in the realm of collective bargaining."

The *Ellis* court did not address this issue, although the district court in *Ellis* found, without explanation, that lobbying expenditures were impermissible under the Railway Labor Act. *Ellis* v. *Railway Clerks,* 91 LRRM 2339 (S.D. Ca. 1976). The only decision directly on point is *Robinson* v. *State of New Jersey,* 547 F.Supp. 1297 (D. N.J. 1982), which construed a New Jersey statute identical to Cal. Govt. Code § 3515.8. The *Robinson* court recognized that at least some lobbying expenditures would be permissible under *Abood,* citing the following language in *Abood*:

> The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.

Abood, supra, at 236, *quoted in, Robinson, supra,* at 1316. The *Robinson* court noted, however, that the statute went beyond allowing lobbying expenditures designed "to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through collective negotiations with the public employer.*" *Robinson, supra,* at 1316. [Emphasis in original.] These lobbying expenditures the court found could not be constitutionally financed through compelled representation fees. Judge Debevoise cited state statutes covering areas such as job security and seniority, and noted that "[t]here are very deep political and ideological differences of opinion as to the merits of these statutes." 547 F.Supp., at 1317.

Given the Ninth Circuit standard for evaluating the permissibility of specific union expenditures, the *Robinson* holding is not particularly persuasive. So long as lobbying activities are "germane to the union's work in the realm of collective bargaining," it would not seem to matter whether there are "very deep political and ideological differences of opinion" as to the merits of the statutes being lobbied. The critical inquiry with respect to lobbying on issues of job security and seniority is whether

the "realm of collective bargaining" includes all subjects traditionally subject to collective bargaining, or only those subjects which the state legislature permits public employee unions to bargain over. This court need not resolve the issue, however, since it appears clear that CSEA engages in other lobbying activities impermissible under the *Ellis* standard but permissible under Cal. Govt. Code § 3515.8.

The *Murch Affidavit* admits that CSEA lobbying activities extend to "subjects affecting all employees, e.g., Workers Compensation, Unemployment Insurance, and Cal-OSHA." *Murch Affidavit,* ¶ 19, p. 13. ln. 18-20. These activities would appear permissible under § 3515.8 as "lobbying activities designed . . . to secure for the employees represented advantages in wages, hours and *other conditions of employment* in addition to those secured through [collective bargaining.]" [Emphasis supplied.] By no stretch of the imagination, however, can such lobbying activity be considered germane or related to work in the realm of collective bargaining. Such areas are administered by state agencies rather than by employers, and are traditionally not the subject of collective bargaining. Indeed, the only agreement that private sector unions and employers could reach in these areas would be an agreement to jointly petition the legislature for changes. Plaintiffs have thus demonstrated probable success in establishing that at least some of CSEA's lobbying expenditures cannot be financed by collection of fair share fees.

b. The demand and return refund system—First Amendment concerns

§ 3515.8 provides that any state employee paying fair share fees "shall have the right to demand and receive . . . under procedures established by the [union]" a refund of the employee's pro rata share of impermissible expenditures. Plaintiffs contend that this system is unconstitutional, although they admit that the decision in *Ellis, supra,* "would appear to direct a contrary result to that urged by Plaintiffs." In *Ellis* the plaintiffs contended that the "demand and return" system was constitutionally insufficient "because it allows the union to collect and retain the full amount of a protesting employees' [*sic*] dues, use part of the dues for objectionable purposes, but not pay the rebate until the following year." 685 F.2d, at 1069. This is the same argument that plaintiffs here make. The Ninth Circuit has rejected the argument, however, stating that it is "meritless." *Id.*

Plaintiffs do not attempt to distinguish *Ellis,* but urge this court to disregard it because the Supreme Court has granted certiorari and because the decision is purportedly wrong. This court, however, is bound to apply clearly controlling Ninth Circuit authority. Accordingly, at this point in time plaintiffs have not demonstrated either "probable success" or that "serious questions" are raised on this issue.

c. The demand and return refund system—due process concerns

Citing *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), plaintiffs argue that before the state may withhold fair share fees from their wages a hearing is required. In *Fuentes,* which involved summary seizure of personal property under a

writ of replevin, the Court stated that notice and an opportunity for a hearing is generally required constitutionally prior to depriving a person of "any significant property interest." 407 U.S. at 82; *Polar Shipping Ltd.* v. *Oriental Shipping Corp.*, 680 F.2d 627, 638 (9th Cir. 1982). As applied here, plaintiffs argue that they are entitled to a hearing before the state begins to withhold fair share fees from their paychecks. Let us assume, however, that plaintiffs were given such a hearing and established that portions of their fair share fees were being spent in violation of their First Amendment rights. Under *Ellis*, plaintiffs would not be entitled to any relief since the "demand and return" system was constitutional. A hearing, then, would be an academic exercise which would only determine how much money the claimants were entitled to at the end of the year. Under these circumstances a hearing would be pointless. It would be argued, of course, that while the "demand and return" system might be constitutionally sufficient to override First Amendment concerns, it is insufficient to override both First Amendment and due process concerns. Courts which have considered the issue from a First Amendment viewpoint, however, could not have been ignorant of the fact that property is involved.

It should also be noted that this case arises in a totally different context than *Fuentes*. This case involves a statutory scheme which allows uniform deductions from the paychecks of employees. The deductions are not based on the particular circumstances of the individual. *Fuentes*, on the other hand, involved resolution of debtor-creditor disputes solely on the word of the creditor. Both the existence of the debt and the amount of the debt could have

been in dispute. Here the existence of the debt is certain, and only the standard amount is challenged. This case might be analogized to tax cases where the IRS is permitted, without a prior hearing, to direct employers to withhold taxes even where exemptions are claimed. See *Stonecipher* v. *Bray*, 653 F.2d 398 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), *citing*, *Phillips* v. *Commissioner*, 283 U.S. 589 (1931). While the court in *Fuentes* noted that *Phillips* involved a situation where it is essential that government needs be immediately satisfied, 407 U.S. at 92, n.24, and thus the tax cases could be distinguished as unique, the rationale of *Fuentes* does not seem compelling when applied to regular monthly withholdings that can be challenged eventually.

Although in light of *Ellis* the Court finds it hard to conclude that plaintiffs have demonstrated that they will probably succeed on this claim, the claim does appear to raise serious issues which need to be litigated.

d. Equal protection—CSEA members vs. non-CSEA members

Article III, Section 10(a) of the bargaining agreement provides that "[t]he State agrees to deduct and transmit to CSEA all deductions authorized on a form provided by CSEA and . . . to deduct and transmit to CSEA fair share fees of state employees who do not elect to be members of CSEA." Plaintiffs argue that this provision discriminates against them because they have not joined CSEA, since by the terms of the provision only non-CSEA employees are subject to automatic deductions. The *Affidavit of Gerald J. Gress*, Controller of CSEA, states that "CSEA has a written policy that requires all

members covered by collective bargaining agreements containing fair share fee provisions shall pay their dues by payroll deductions." *Gress Affidavit*, ¶ 8, ln. 9-12. The affidavit goes on to state that all civil service employees represented by CSEA, whether CSEA members or not, pay their dues or fair share fees by payroll deduction. Thus plaintiffs, even if they could establish that the agreement unconstitutionally discriminates against them vis-a-vis CSEA members, have not been injured by the alleged discrimination. A requirement that plaintiffs demonstrate some "injury in fact" is mandated by Article III of the Constitution. *Port of Astoria, Oregon* v. *Hodel*, 595 F.2d 467, 474 (9th Cir. 1979). Plaintiffs accordingly do not appear to have raised "serious questions" on this issue.

e. Equal protection—non-CSEA members vs. *non-members of other state employee unions*

Plaintiffs' final argument is that they are being discriminated against vis-a-vis non-union state employees in bargaining units represented by unions other than CSEA. Plaintiffs allege that other unions, prior to being entitled to have the state automatically deduct fair share fees, had to either hold an election on the issue or certify that more than 50% of the bargaining unit employees were union members. CSEA was not subject to this requirement.

If the "rational relationship" test is applied, equal protection is not violated so long as the classification is "rationally related to achievement of a legitimate state purpose." *Western & Southern L.I. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 657 (1981). Defendants explain that the CSEA agreement does not contain the clause requir-

ing some form of majority showing because CSEA bargained for elimination of that clause by agreeing to forego its right to represent some 870 employees whom the state considered to be supervisory personnel. *Murch Affidavit*, ¶ 16, p. 10-11. Thus, the distinction between non-CSEA members and non-members of other public employee unions was drawn in order to achieve certain goals in state personnel practice. Since the agreement to forego the clause directly led to the achievement of the state's goals, the rational relationship test has been met.

Plaintiffs do not argue that the classification cannot satisfy the "rational relationship" test; rather, they argue that since First Amendment interests are implicated the "strict scrutiny" standard should apply. This standard, which requires the state to justify the classification as "*necessary* to promote a *compelling* governmental interest," *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972) (emphasis in original), applies "when government action impinges upon a fundamental right protected by the Constitution." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, ___ U.S. ___, 51 U.S.L.W. 4165, 4170 (February 23, 1983). Plaintiffs, however, oversimplify the matter. It is already settled by *Abood* that unions may constitutionally collect fair share fees, despite the First Amendment implications. What is at issue here is simply the question of whether non-union members may be required to pay those fees on their own or whether the state may perform the collection function by means of automatic payroll deductions. This mere choice of method does not implicate First Amendment rights or any other fundamental rights. Since no fundamental right is burdened, the strict scrutiny test is inapplicable. *Perry Education Assn., supra,* at 4170.

Plaintiffs may also be arguing that they are being discriminated against because they have chosen not to join CSEA, and that strict scrutiny is required because of this suspect classification. While this argument is a compelling one when applied to plaintiffs' other equal protection claim, it is incorrect when applied here. Plaintiffs are being treated differently than non-members of other state employee unions, who stand in the same shoes as plaintiffs with respect to First Amendment issues. The discrimination here is based upon the jobs plaintiffs hold, and thus the bargaining unit that they are in. We have found no authority holding that this type of discrimination involves a suspect classification. Accordingly, plaintiffs probably will not prevail upon this issue.

3. Irreparable injury/balance of hardships

a. Use of fair share fees to finance lobbying activities

As stated earlier, plaintiffs will probably succeed in establishing that at least some of the lobbying expenses incurred by CSEA may not be financed through the collection of fair share fees. Plaintiffs' First Amendment rights are thus being infringed. While it is true that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), in the context of this case the Ninth Circuit has held that restitutionary remedies are acceptable. *Ellis, supra,* at 1069-70. In other words, even if defendants conceded that use of fair share fees to pay for lobbying expenditures was unconstitutional, the only remedy to which plaintiffs would be entitled would be a refund pursuant to the demand and return system. Since plaintiffs are only enti-

tled to this relief, a preliminary injunction enjoining defendants from collecting or expending any fair share fees is obviously improper.

b. The demand and return refund system—due process concerns

We also found that serious questions on the merits exist as to this issue. In order to determine whether a preliminary injunction is warranted, the court must evaluate whether the balance of hardships tips sharply in the movant's favor. In making this determination, it must be noted that First Amendment rights are not implicated by this issue. Rather, it is only plaintiff's property rights in the money withheld which concerns the court.

Viewed in this way, injunctive relief would appear improper. First, the temporary loss of income does not ususally [*sic*] constitute irreparable injury sufficient to justify preliminary injunctive relief. *Los Angeles Memorial Coliseum Com'n* v. *Nat. Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980), *quoting, Sampson* v. *Murray,* 415 U.S. 61, 90 (1974). Plaintiffs do not contend that the money withheld creates any great financial hardship, or even that their ability to exercise First Amendment rights is actually, as opposed to theoretically, restricted. Indeed, the *Supplemental Affidavit of Gerald J. Gress* states that the refund checks for objecting employees' pro rata shares of political expenditures would be sent out by July 1, 1983 and that such shares would no longer be withheld as part of fair share fees for those objecting employees. The union, on the other hand, would be seriously harmed by an injunction against the collection of all fair share

fees. $4-4.7 million out of the union's $10.8 million budget for its Civil Services Division is collected as fair share fees. Enjoining collection of these fees would obviously have an effect on the union's ability to function, as detailed in both the Gress and Murch affidavits. Moreover, only $154,000 of the fair share fees collected are spent on lobbying activities. *Gress Affidavit,* ¶ 15-17, p. 10-12. If this court were to enjoin the collection of all fair share fees, plaintiffs would become free riders accepting the services of CSEA but refusing to contribute to any of its costs. Agency shop provisions have been found constitutional in order to avoid this result. The balance thus does not tip sharply in movant's favor, if indeed it tips in their favor at all.

III. PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASSES

Rule 23(a), *Federal Rules of Civil Procedure,* sets out four prerequisites to maintenance of a class action lawsuit:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The decision to grant or deny class certification is within the trial court's discretion. *Yamamoto* v. *Omiya.* F.2d

1319, 1325 (9th Cir. 1977).

With respect to the "free speech" class plaintiffs seek to have certified, defendants contend that the third and fourth requirements have not been met. The typicality requirement is designed to assure that the interests of the named representatives are aligned with those of the class. *Jordan* v. *County of Los Angeles,* 669 F.2d 1311, 1321 (9th Cir. 1982), *vacated on other grounds,* ___ U.S. ___, 103 S.Ct. 35 (1983). The requirement is met where there is a nexus between the plaintiffs' injury and the injury suffered by the class—i.e., where the claim "stems from the same event, practice, or course of conduct that forms the basis of the class claims." *Id.* Here, in answers to interrogatories CSEA states that as of June 10, 1983 it had received 573 objections to "some uses by CSEA of portions of individual fair share fees." 39 of those objections, according to CSEA, are to "political, ideological and other non-collective bargaining activities," while the rest are to expenditures for "partisan political or ideological causes that are only incidentally related to the terms or conditions of [their] employment." Defendants contend that it would be improper for plaintiffs to represent this latter group, since they have not objected to use of their money for lobbying activities and thus plaintiffs' claims are not typical of theirs. Another Court has refused to certify a class on precisely these grounds. *Olsen* v. *Communications Workers of America,* CV 82-3443 (January 3, 1983). Judge Debevoise's conclusion appears correct, since non-union members who object to use of their money for political and ideological purposes may not object to use of their money for lobbying activities designed to obtain greater benefits for the employees.

Nevertheless, there are at least 39 members who defendants concede are properly in the class. The Ninth Circuit has indicated in dicta that it "would be inclined to find the numerosity requirement satisfied" by a class of 39. *Jordan, supra,* at 1319. The question thus becomes whether plaintiffs can adequately represent this class.

This requirement is met where "the named representative's attorney [is] qualified, experienced, and generally capable [of conducting] the litigation, and . . . the named representative's interests [are not] antagonistic to the interests of the class." *Jordan, supra,* at 1323. In this respect it must be noted that plaintiffs seek to have SEERA and its fair share fee requirements declared unconstitutional, and also seek to enjoin the collection of all fair share fees, not just those to be used for impermissible purposes. This relief is not necessarily consistent with the interests of those who might well not object to collection of fair fees to be used for collective bargaining purposes. This variance is not a *de minimus* one, since enjoining the collection of what might turn out to be a substantial portion of the union's budget (if the class were to grow) might well have an undesired effect on the union's ability to carry out its collective bargaining functions properly. Accordingly, the first class sought to be certified will not be certified.

As to the second class which plaintiffs seek to have certified, the words of Judge Debevoise seem particularly appropriate:

> As a practical matter, I see no need to designate a class of any sort at this time in order to achieve the ob-

> jectives which plaintiffs seek. The Federal questions involved can be resolved in the proceeding as it is now constituted. To the extent that these rulings withstand scrutiny on appeal, they will be binding on the defendants in this case and assuredly will be complied with in the future.

Olsen, supra.

Plaintiffs here raised two equal protection arguments aimed at enjoining the collection of fair share fees through payroll deductions. Apart from the problem that plaintiffs have made no showing that *any* members of the proposed class are interested in pursuing these claims (indeed, unlike the typical civil rights suit, the relief sought here is indeed a "mixed blessing" that might not be desired by the class), if this court holds that the State cannot (at this time) constitutionally deduct fair share fees from payroll checks, the ruling will extend to non-union employees. The same holds true if this court were to hold that the state could not withhold fair share fees without setting up some form of prior hearing mechanisum [*sic*]. Accordingly, there is little point in certifying the second class.

There is also a question as to whether plaintiffs here can adequately represent this second class. Again, antagonism between plaintiffs' interests and the interests of the class appear to exist. The interest of those allegedly injured by the equal protection violations would be, at most, to enjoin the collection of fair share fees by payroll deductions. Plaintiffs, on the other hand, seek to have this court enjoin the collection of fair share fees in any manner. There is no showing at all that the proposed class

has any actual or legitimate interest in this relief.

Accordingly, the motion for class certification is denied, as are the other two motions here considered. The denial of the motion for preliminary injunction is without prejudice to its renewal in the event review of *Ellis* by the Supreme Court justifies such renewal.

This *Memorandum of Decision* shall constitute those findings of fact and conclusions of law required by Rule 52, *Federal Rules of Civil Procedure.*

The Clerk of the Court will serve copies of this Memorandum of Decision and Order by United States mail upon counsel of record.

DATED: This 30th day of September, 1983.

/s/ Lawrence T. Lydick

Lawrence T. Lydick
United States District Judge

APPENDIX A-2

Opinion of the United States Court of Appeals for the Ninth Circuit, July 30, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA B. CHAMPION, *et al.*, *Plaintiffs/Appellants,* v. STATE OF CALIFORNIA, *et al.*, *Defendants/Appellees.*	)	No. 83-6315 DC No. CV 83-2598-LTL **OPINION** July 30, 1984

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding

Argued and Submitted June 4, 1984

Before: WRIGHT, FERGUSON and REINHARDT,
Circuit Judges

FERGUSON, Circuit Judge:

The plaintiffs, Lydia Champion and fourteen other public employees, appeal the district court's denial of a preliminary injunction. They sought to enjoin their employer, the State of California, from deducting "fair share fees" from their paychecks and giving the money to their bargaining representative, the California State Employees Association (CSEA). In their underlying suit they challenge the propriety of the union's expenditures under *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977),

and *Ellis v. Brotherhood of Railway Clerks*, ___ U.S. ___, 104 S.Ct. 1883 (1984), and the constitutionality of the state law under which the deductions were made. We affirm.

FACTS

In 1982, effective January 1, 1983, the California legislature amended the State Employer-Employee Relations Act (SEERA) to provide that "[o]nce an employee organization is recognized as the exclusive representative of an appropriate unit, it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction." Cal. Gov't Code § 3515.7(a). The state employer is authorized to deduct a membership or fair share fee from the employee's salary or wages. *Id.* § 3515.7(b). The employee organization is required to keep "an adequate itemized record of its financial transactions" and to make available to the state Public Employment Relations Board and to the employees a "detailed, written financial report" annually. *Id.* § 3515.7(e).

The statute makes special provisions for "fair share fees," the fees paid by bargaining unit employees who choose not to become members of the employees' association or union. Although the state employer may deduct an amount to equal their "fair share" of the cost of representation and forward it to their representative, the employee has the right to demand and receive from the representative a return of any part of the fee which is spent "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and

conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization." *Id.* § 3515.8. The statute further provides that the refund shall not reflect or include:

> the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section.

The first payroll deduction pursuant to these sections was made on February 1, 1983. All employees were notified of their right to object to and to demand a refund of money used for "partisan political or ideological causes." According to the defendants, since July 1, 1983, CSEA does not wait to refund money deducted from objecting employees' paychecks, but eliminates from the deduction the amount it determines is spent for political or ideological purposes.

Plaintiffs brought suit under 42 U.S.C. § 1983, challenging the constitutionality of sections 3515.7 & 3515.8 under the First and Fourteenth Amendments. Pending final resolution, plaintiffs sought a preliminary injunction restraining the deduction and collection of any portion of plaintiffs' wages as fair share fees.

The district court denied the plaintiffs' motion for a preliminary injunction and also denied plaintiffs' motion for class certification and defendants' motion to abstain. Only the denial of the preliminary injunction has been appealed.

ISSUES

1. Did the district court abuse its discretion in denying the preliminary injunction?

2. How does the Supreme Court's recent opinion in *Ellis v. Railway Clerks* affect the result?

DISCUSSION

Standard of Review

A grant or denial of a preliminary injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion. *Sports Form, Inc. v. UPI, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "To determine whether there has been an abuse of discretion, the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . .' " *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US. 402, 416 (1971)).

The relevant factors ordinarily considered on a motion for a preliminary injunction are either (1) whether the probability of success on the merits and the possibility of irreparable harm justify an injunction, or (2) whether serious questions are raised and the balance of hardships

tips sharply in the movant's favor. *Sports Form, Inc.* 686 F.2d at 753 (and cases cited therein). The district court considered the proper legal factors in reviewing the motion for a preliminary injunction.

1. Did the District Court Abuse Its Discretion in Denying the Preliminary Injunction?

The plaintiffs concede that a state may deduct a "fair share fee" from state employees who are part of a bargaining unit but not members of the bargaining association. *Abood v. Detroit Board of Education, supra.* However, they assert that the scope of the fair share fee as defined in section 3515.8 is beyond the amount permissibly deductible from nonmember employees. The preliminary injunction they sought would have enjoined all deductions taken from the plaintiffs' paychecks pursuant to section 3515.7.

The district court's denial of this injunction is in accord with the Supreme Court's holdings in *Abood v. Detroit Board of Education, supra*; *Railway Clerks v. Allen,* 373 U.S. 113 (1963); *International Association of Machinists v. Street,* 367 U.S. 740 (1961); *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956). Although the district court conducted the analysis ordinarily applied on motions for preliminary relief, it is clear that under *Allen, Street* and *Abood* it would have been error to issue the preliminary injunction.

In a series of cases beginning with *Railway Employes' Department V. Hanson,* 351 U.S. 225 (1956), the Supreme Court has consistently upheld the constitutionality

of statutes authorizing a union shop and the compelled payment of "fair share fees" or dues to the employee representative. *Hanson* involved an attack on the facial constitutionality of section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh. The Court upheld the statute as a valid legislative policy choice, and rejected the arguments that it violated the First Amendment or the Due Process Clause of the Fifth Amendment.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court recognized that funds paid to the union by objecting employees, compelled pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh, could only be used for limited purposes. The Court held, however, that an injunction against all such compelled payments was unjustified. It said:

> Restraining the collection of all funds from the appellees [objecting employees] sweeps too broadly since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds . . . might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 771. In *Allen*, the Court was even more emphatic. It stated that "lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*" 373 U.S. at 120 (emphasis added). *See also Abood*, 431 U.S. at 241 ("For all the reasons outlined in

Street, the court was correct in denying the broad injunctive relief requested."); *Dean v. TWA,* 708 F.2d 486 (9th Cir.), *cert. denied,* 104 S.Ct. 490 (1983). In light of these opinions and the Court's holding in *Abood* that union security arrangements in public employment do not abridge employee First Amendment or Due Process rights, 431 U.S. at 232, the district court was correct in denying preliminary relief.

Even if a more narrow injunction could be fashioned under plaintiffs' motion, *see, Robinson v. State of New Jersey,* 547 F. Supp. 1297, 1323-24 (D.N.J. 1982), there do not appear to be any special circumstances rendering a preliminary injunction appropriate in this case. Defendants state that they have eliminated that portion of the fair share fee which goes to "partisan political or ideological causes only incidentally related to the terms and conditions of employment." Thus, the amount collected no longer includes amounts clearly subject to refund under the statute. Moreover, unlike the situation of *Robinson, supra,* there has been no argument or showing that CSEA's refund or accounting procedures are "unusable" or "onerous." 547 F. Supp. at 1323.

2. The Effect of the Supreme Court's Opinion in *Ellis v. Railway Clerks.*

Plaintiffs challenge the facial constitutionality of section 3515.8, particularly that portion which reserves to the employee representative the right to use fair share fees for certain lobbying activities. In *Ellis v. Railway Clerks,* ___ U.S. ___, 104 S.Ct. 1883 (1984), the Court, in considering challenges to several types of expenditures, stated:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

104 S.Ct. at 1892. The Court did not consider lobbying expenditures in its opinion, although the district court in *Ellis* had found such expenditures impermissible. *Ellis v. Railway Clerks,* 91 LRRM 2339, 2342-43 (S.D. Cal. 1976). Nonetheless, the district court did not abuse its discretion in declining to issue a preliminary injunction on this limited basis. It correctly noted that in *Abood* the Court recognized that in public employment, as contrasted with private employment under the Railway Labor Act at issue in *Ellis,* the line between permissible and impermissible expenditures may be "somewhat hazier." The Court stated:

> The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.

Abood, 431 U.S. at 236. The determination of whether

certain expenditures are proper depends on the nature of the bargaining process. *See Ellis,* 104 S.Ct. at 1892; *Abood,* 431 U.S. at 236 & n.33.

Section 3515.8 of SEERA, which plaintiffs challenge as impermissibly broad, is based on the understanding that collective bargaining in the public sector requires resort to the legislature on various employment-related questions. *See Abood,* 431 U.S. at 236. Section 3517.5 requires that the state employer-employee agreement, or memorandum of understanding, be presented "to the Legislature for determination." Cal. Gov't Code § 3517.5. The expenditure of funds required by the memorandum of understanding is dependent upon legislative approval, as is the implementation of other provisions which may be inconsistent with various state statutes. *See id.* § 3517.6.

Because public employees work for the state, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. For example, grievance adjustment, Cal. Gov't Code § 18714; computation of leave when there is a break in service, *id.* § 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *id.* § 19827.2 (a); the notice and hearing procedure when an employee's salary is changed, *id.* § 19828; and the use of hourly or day workers, *id.* § 19830, are provided by statute, but may be changed through negotiation. See generally *id.* § 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted

in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code § 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature.

The Court did reject one aspect of the Ninth Circuit decision in *Ellis*. This circuit had held that a rebate plan adequately protected the nonmembers' right to avoid contributing to objectionable political purposes. *Ellis v. Brotherhood of Railway Clerks,* 685 F.2d 1065, 1069 (9th Cir. 1982). The Supreme Court rejected this approach, holding that once the amount of unauthorized expenditures has been determined, that amount must be deducted from the fair share fee. It held that a rebate scheme does not adequately protect the nonconsenting employees' rights. *Ellis,* 104 S.Ct. at 1889-90.

The *Ellis* holding does not determine the validity of the California statute authorizing a fair share deduction nor the disposition of this appeal. In this case, we face the problems that *Allen* and *Street* recognized in considering broad preliminary relief. In contrast, *Ellis* was decided on a fully developed record and controls only the remedy after a final judgment on the merits. *See Allen,* 373 U.S. at 120. Moreover, as the rebate is a separate and distinct part of the California scheme, its invalidity should not affect the constitutionality of the statute as a whole. Nor would it affect any voluntarily adopted procedure such as CSEA has described whereunder the Association forgoes the initital collection of the amounts that it might otherwise be required to rebate under the statute.

CONCLUSION

The district court order denying the motion for a preliminary injunction is affirmed.

APPENDIX A-3

Order of the United States Court of Appeals, September 26, 1984, denying the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA B. CHAMPION, *et al.*, *Plaintiffs/Appellants,*	)	No. 83-6315
	)	DC No. CV 83-2598-LTL
v.	)	Central California
STATE OF CALIFORNIA, *et al.*, *Defendants/Appellees.*	)	**ORDER**
	)	September 26, 1984

Before: WRIGHT, FERGUSON AND REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Ferguson and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Wright would so recommend.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B-1

First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B-2

Sections of the California State Employer-Employee Relations Act.

State Employer-Employee Relations Act

Sec. 3512. [Legislative purpose] It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employee-employer relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by such organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3513. [Definitions] As used in this chapter:

(a) "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state.

(b) "Recognized employee organization" means an employee organization which has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

* * *

(i) "State employer" or "employer," for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

* * *

(j) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3515. [Organization; representation] Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (h) of Sec. 3513, or a fair share fee provision, as defined in subdivision (j) of Sec. 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

* * *

Sec. 3515.5. [Exclusive representation] Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state.

* * *

Sec. 3515.7. [Organizational security agreements]

(a) Once an employee organization is recognized as

the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees, and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering the provisions of this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

* * *

(e) Every recognized employee organization which has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in

the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

* * *

Sec. 3515.8. [Fair share fees; pro rata share subject to refund] Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization: The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in w[illegible]s, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section. (As added by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3516. [Scope of representation] The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Sec. 3516.5. [Notice of meet and confer] Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.

In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation. (Sec. 3516.5, as amended by Ch. 776, L. 1978)

Sec. 3517. [Good faith meet and confer] The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employ-

ment with representatives of recognized employee organizations and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

Sec. 3517.5. [Memorandum of understanding] If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination.

APPENDIX B-3

Memorandum of Understanding between the State of California and the California State Employees Association

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This MOU sets forth the full and entire understanding of the parties regarding thee matters contained herein and supercedes Article III, Section 10 of agreements between the parties covering Units 1, 3, 4, 10, 11, 12, 14, 15, 17, and 20, covering the period July 1, 1982 through June 30, 1984.

ARTICLE III

10. Organizational Security

a. It is the intent of this Section to provide for payroll deductions, insofar as permitted by law, for the employees exclusively represented by CSEA. The State agrees to deduct and transmit to CSEA all deductions authorized on a form provided by CSEA and pursuant to Government Code Section 3515.7 to deduct and transmit to CSEA fair share fees of state employees who do not elect to be members of CSEA. These authorized deductions and fees shall be remitted monthly to CSEA along with an adequate itemized record of deductions including, if required by CSEA, machine readable data. CSEA shall incur any reasonable costs incurred by the State Controller for these deductions.

* * *

(2) The amount of membership dues and fair share fees shall be set by CSEA and changed by the State upon written notice from CSEA.

(3) CSEA agrees to indemnify, defend and hold the State harmless against any claims made of any nature and against any suit instituted against the State arising

from its checkoff of these deductions.

* * *

f. The State agrees to notify each new employee and each present employee upon the initial fair share fee deduction of the amount of the fair share fee and the employees' rights to a rebate of the portion used by CSEA for political contributions. The notice will be drafted by CSEA subject to approval by the State. Said notice will be placed in the employee payroll envelope at least once each year.

g. CSEA agrees that the amount of the fair share fee established by CSEA shall not include the pro-rata share of costs of any benefits available only to CSEA members.

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